Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)	CC Docket No. 02-39

REPLY COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Lawrence J. Lafaro
Stephen C. Garavito
Martha Lewis Marcus
AT&T CORP.
Room 1135L2
295 North Maple Avenue
Basking Ridge, N.J. 07920
(908) 221-8100

David L. Lawson
Paul J. Zidlicky
C. Kevin Marshall
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Attorneys for AT&T Corp.

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 3

I. THE COMMENTS CONFIRM THAT THE EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS CARRIED FORWARD IN SECTION 251(G) REMAIN ESSENTIAL. 3

  A. The Comments Show That The Equal Access And Nondiscrimination Requirements Carried Forward In Section 251(g) Remain Necessary Because BOCs Retain The Ability And Incentive To Abuse Their Market Power Over Local Bottleneck Facilities. 3

  B. The BOCs' Efforts to Abolish the Equal Access and Nondiscrimination Obligations Carried Forward by Section 251(g) Should Be Rejected. 8

    1. The BOCs Arguments Depend on a Mischaracterization of the Basis for the Equal Access and Nondiscrimination Obligations. 8

    2. The BOCs Additional Arguments for Abolishing the Equal Access and Nondiscrimination Requirements Also Fail. 15

II. THE COMMENTS CONFIRM THE NEED FOR THE COMMISSION TO TAKE ADDITIONAL STEPS TO COMBAT THE BOCS' ABILITY TO USE THEIR MARKET POWER TO UNDERMINE LONG DISTANCE COMPETITION. 17

III. THE COMMENTS CONFIRM THAT EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS BENEFIT COMPETITION ONLY WHEN APPLIED TO LIMIT THE EXERCISE OF MARKET POWER OVER BOTTLENECK LOCAL FACILITIES. 19

CONCLUSION 20

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers	)	CC Docket No. 02-39

REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.415(c) of the Commission's Rules, 47 C.F.R. § 1.415(c), AT&T Corp. ("AT&T") submits these reply comments in response to the Commission's Notice of Inquiry ("*Notice*") regarding the equal access and nondiscrimination obligations of local exchange carriers.[1]

INTRODUCTION

The comments resoundingly confirm that the fundamental need for the equal access and nondiscrimination requirements carried forward in Section 251(g) of the Telecommunications Act of 1996 ("1996 Act") remains as strong today—if not stronger—as when these obligations first were adopted.

In particular, the comments make clear that the essential predicate for the equal access and nondiscrimination requirements carried forward by Section 251(g) remains: The BOCs maintain overwhelming market power over the local exchange facilities that are critical to competition in the interexchange and information services markets. The comments further

[1] *In re Notice of Inquiry Concerning a Review of the Equal Access & Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39 (rel. Feb. 28, 2002).

reflect that the changes to the legal landscape ushered in by the 1996 Act — including the ability of BOCs to offer in-region interLATA service after obtaining Section 271 approval — have *increased* the need for enforcement of the equal access and nondiscrimination protections to protect consumers. Simply put, there is now a substantially increased incentive by the BOCs to abuse their market dominance in the local telecommunications market to limit competition and consumer choice in the interexchange market. The increased incentive to discriminate, coupled with the persistent *ability* of the BOCs to discriminate, provide overwhelming support for, at a minimum, retaining the existing equal access obligations and requirements that § 251(g) carries forward. *See*, *e.g.*, NASUCA at 7; Texas PUC at 2.

The BOCs' efforts to avoid these conclusions are based upon the erroneous view that the equal access and nondiscrimination requirements carried forward in § 251(g) were designed to protect local exchange carriers against a dominant interexchange carrier. But that argument, as the comments show, is demonstrably false and is refuted by unequivocal decisions of both the MFJ court and the D.C. Circuit. Moreover, that argument cannot be reconciled with Congress's enactment of § 251(g)—which carries forward the equal access and nondiscrimination obligations of the MFJ—even though there were no longer any dominant interexchange carriers in the market in 1996 when it was enacted. *See* NASUCA at 4.

Indeed, as the comments confirm, marketplace and legal conditions require the Commission to *augment* these existing requirements carried forward by Section 251(g) to protect consumers and competition by (1) policing discriminatory marketing practices by the BOCs, (2) creating a mechanism whereby BOCs would no longer dominate customers' preferred carrier choices, changes and freezes, and (3) mandating customer account record exchange ("CARE") obligations on all LECs. *See* AT&T at 23-45; *see also* ASCENT at 7-8; Texas PUC at 6;

WorldCom at 4-5. Finally, the comments confirm that the equal access and nondiscrimination obligations of Section 251(g)—which were designed to limit the abuse of market power—should not and cannot rationally be applied to non-dominant LECs.

ARGUMENT

I. THE COMMENTS CONFIRM THAT THE EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS CARRIED FORWARD IN SECTION 251(G) REMAIN ESSENTIAL.

The comments confirm that continued application of the equal access and nondiscrimination requirements carried forward by 47 U.S.C. § 251(g) is necessary to maintain and promote vigorous competition in the interexchange telecommunications market. Indeed, the requirements are more important today than they were when the MFJ was first adopted. The BOCs, of course, disagree and urge the Commission to abolish those requirements. In doing so, however, the BOCs disregard the reasons for those requirements and therefore wholly misinterpret the relevance of current market conditions to the continuing need for these requirements.

A. The Comments Show That The Equal Access And Nondiscrimination Requirements Carried Forward In Section 251(g) Remain Necessary Because BOCs Retain The Ability And Incentive To Abuse Their Market Power Over Local Bottleneck Facilities.

The economic and regulatory rationale for the equal access and nondiscrimination obligations that the MFJ adopted and § 251(g) carried forward is simple and unassailable: The BOCs, because of their monopoly control over the bottleneck local exchange facilities and related services, have the ability and incentive to discriminate among interexchange carriers to benefit themselves. AT&T at 6-13. As AT&T has shown, that rationale applies now even more than it did under the MFJ. *Id.* The BOCs retain their longstanding market dominance over local facilities that enables them to discriminate against and among interexchange carriers. And, under 47 U.S.C. § 271, the BOCs now have the prospect of obtaining approval to provide in-region interLATA service, and therefore their incentives to discriminate among interexchange carriers are substantially enhanced. *Id*. at 18-21.

The primary focus of the decisions under the MFJ was the BOCs' dominance over the local exchange bottlenecks and their resulting ability to leverage that dominance into control of the long distance market. When the MFJ was approved, BOCs were using their leverage to favor AT&T's long distance service, but the threat of discriminatory treatment was the same regardless of whom the BOCs chose to favor. As the MFJ court explained, unless limited by the MFJ's equal access and nondiscrimination obligations, a BOC could "use its stranglehold on essential facilities and services to thwart effective competition." *United States* v. *Western Elec. Co.*, 846 F.2d 1422, 1429 (D.C. Cir. 1988). That is, the BOC could appoint itself "the arbiter of future inter-LATA . . . services," shaping the market "to suit its needs or interests" and thereby frustrating competition. *Id*. at 1428 (*quoting id*., 583 F. Supp. 1257, 1259 (D. D.C. 1984)). Accordingly, the purpose of these MFJ requirements was "to stymie" discrimination, whether directed in favor of or against AT&T. *Id*. at 1429.

The comments confirm these conclusions. "The need for equal access requirements has never been driven by the dominance, *per se*, of a particular regional or national interexchange carrier"; rather, "the equal access requirements were necessary to the public interest in order to protect competitive IXCs from ILEC discrimination because the ILECs had bottleneck control of their local facilities." Gen. Communication at 8-9. The requirements thus "were based on concerns regarding the local network and not on the status of competition in the interexchange market." *Id*. at 1. Put simply, "[t]he equal access and nondiscrimination obligations are rooted in the principle that competition cannot flourish when carriers have the ability to exercise market power through their control of bottleneck facilities." Sprint at 2; *see also* ASCENT at 9-10 & n.22; NASUCA at 5 ("[T]here was a concern that BOCs would use their local exchange monopoly to influence the long distance market"). The Supreme Court recently reiterated this same common-sense reasoning in a related context:

> It is easy to see why a company that owns a local exchange (what the Act calls an "incumbent local exchange carrier," 47 U.S.C. §251(h)), would have *an almost insurmountable competitive advantage . . .* , *through its control of this local market, in the market for terminal equipment and long-distance calling as well*.

Verizon Communications Inc. v. *FCC*, 535 U.S. --, --, 122 S.Ct. 1646, 1662 (2002) (emphasis added).[2]

Because the rationale for the MFJ's equal access and nondiscrimination requirements is to prevent the abuse of market power over local facilities and thus to prevent discrimination against or among participants in the long distance market, it necessarily follows, as the comments confirm, that the requirements carried forward in § 251(g) remain essential for securing fair, robust competition in today's interexchange market. The requirements are equally necessary today because the BOCs maintain a stranglehold on local facilities and services. NASUCA effectively marshals the existing data:

> ILECs still control 91% of end-user switched access lines nationwide;
>
> ILECs own 97% of end-user switched access lines;

---

[2] SBC concedes that the MFJ's equal access and nondiscrimination requirements were designed to restrict BOC interference in the interexchange market. SBC at 4-5. Indeed, even Verizon acknowledges that the MFJ court and the Justice Department paid great attention to the incentive to discriminate among IXCs and depended on the equal access and nondiscrimination requirements to mitigate any such incentive. Verizon at 6-7.

> ILECs control 94.5% of residential and small business end-user switched access lines; and
>
> ILECs account for 91.1% of local service revenues.

NASUCA at 2-3.

Thus, there can be no debate that the "BOCs unquestionably enjoy overwhelming market power," Sprint at 3. Indeed, they control "approximately 7/8 of the nation's switched access lines, located across broad and contiguous geographical areas." *Id*. "By any reasonable definition," they "are still monopolists." NASUCA at 3. As a result, the Texas Public Utility Commission notes that, six years after Congress passed the 1996 Act "and almost two years since SWBT was granted entry into the long distance market in Texas, CLECs still serve only about 14% of the end user switched access lines in Texas." Texas PUC at 4; *see id*. at 3.[3] "In 2002, incumbent LECs retain control of the same 'local switches and circuits . . . that gave the Bell System its power over the competition.'" ASCENT at 11 (*quoting United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 536 (D. D.C. 1987)). Such control "translates into the ability to disadvantage current or potential interexchange carrier competitors," *id*., which made the MFJ's requirements necessary then, and, in the same way, makes these requirements necessary now.

Even in the minority of States where the Commission has concluded that BOCs have met the requirements of § 271(c) for being "open" to competition, the BOCs retain overwhelming market power, and competition remains nascent. In New York, the first § 271 State and the one that the *Notice* identifies as having the greatest market penetration by CLECs,

[3] *See also* WorldCom at 2 (noting BOCs possess "overwhelming market power in the provision of access services"); Gen. Communication at 1 ("ILECs still retain the bottleneck control that required adoption of equal access rules in the first place"); *id*. at 9; ASCENT at 3; NASUCA at 2-3; TeleTruth at 47 n.4.

penetration is low, *see* AT&T at 19, and "the large majority of customers served by competitors are served either entirely . . . or in part . . . over Verizon facilities," ASCENT at 4 n.9; *see* Gen. Communication at 11; AT&T at 19 n.12. Indeed, § 271 authority has been granted in many other jurisdictions with only a fraction of the New York market penetration. ASCENT at 4 n.9. And in Texas, another jurisdiction highlighted in the *Notice*, even the State's PUC acknowledges that "the competitive telecommunications industry . . . is still in its' [*sic*] formative years," such that the PUC "is concerned that elimination of equal access and nondiscrimination requirements could halt competition before it has had sufficient opportunity to take root." Texas PUC at 3.

The comments confirm that the overriding importance of § 271 approval (and the prospect of such approval) in this context is that it creates a strong incentive for BOCs to discriminate among interexchange carriers. That new incentive—one that is more direct and potentially more lucrative than any under the MFJ—*increases*, rather than decreases, the need for the market protections carried forward by § 251(g). As ASCENT points out, "[t]he concern that incumbent LECs will favor their own retail interexchange operations or interexchange affiliates is even more solidly based than the concern that the newly-divested BOCs would favor AT&T." ASCENT at 10. That conclusion recurs throughout the comments. *Id*. at 11-12 ("[T]he grant of Section 271 authority, or the potential for such grant, certainly provides ample incentive to act anticompetitively").[4]

[4] *See also* NASUCA at 5 ("After the MFJ, BOCs *might* have had an incentive to discriminate in favor of their former affiliate, AT&T. With Section 271 approval, BOCs *would* have an incentive to discriminate in favor of their own affiliated long distance companies"); Texas PUC at 4-5 (urging Commission to retain requirements "for BOCs, and in particular, for those that have obtained 271 approval"); Sprint at 3 (explaining that risk of discrimination "is particularly great in those markets where BOCs have been granted Section 271 authority"); WorldCom at 1-2 (explaining that there is "no merit" in Commission's suggestion that § 271 approval warrants modifying requirements).

In sum, the comments establish the continuing—and increased—need for the equal access and nondiscrimination requirements. That result is essential if the Commission is to accomplish Congress's goal of promoting competition and innovation. As one commenter has explained, "prematurely freeing carriers that retain market power from regulatory constraints which limit abuse of that power will produce the exact opposite" of that goal. *Id*. at 2.

B. The BOCs' Efforts To Abolish The Equal Access And Nondiscrimination Obligations Carried Forward By Section 251(g) Should Be Rejected.

The BOCs advance numerous arguments for doing away with the equal access and nondiscrimination obligations, as continued by § 251(g). At the outset, it is important to recognize that the BOCs have made no effort to show any need for the elimination of these obligations because, in fact, the equal access and nondiscrimination requirements "have not hindered the BOCs from competing in the long distance market." NASUCA at 6; *see also* AT&T at 24-25. Thus, for example, despite the existence of § 251(g), "Verizon's share of the residential long distance market in New York jumped to 20% in its first year . . . and continued to climb precipitously—to about 34.2%—by the end of its second year." *Id.* at 24. Furthermore, the arguments that the BOCs do make depend on a mischaracterization of the rationale underlying the equal access and nondiscrimination obligations.

1. The BOCs' Arguments Depend on a Mischaracterization of the Basis for the Equal Access and Nondiscrimination Obligations.

The BOCs argue that the obligations that § 251(g) carries forward have outlived their usefulness. But their arguments provide no answer to the showing by AT&T and the majority of other commenters that the economic and regulatory need for these requirements persists because of the BOCs' continuing ability and increased incentive to discriminate in the interexchange market.

The BOCs cannot and do not dispute that they maintain a continuing *de facto* monopoly over the local bottlenecks and related services. Instead, Verizon attempts to avoid the issue of local market power by focusing on the distinct question whether local markets are "open" to competition rather than on whether significant competition (particularly facilities-based competition) actually exists in those markets. Verizon at 3, 11-12; *see also* BellSouth at 4.[5] Of course, Section 271 approval has been granted in only a minority of jurisdictions. NASUCA at 3. But more to the point, the Commission has explained that even where Section 271 approval is granted, "the local exchange market will not be fully competitive immediately upon its opening." *Non-Accounting Safeguards Order* ¶¶ 9-10;[6] *see also* AT&T at 18-19; Gen. Communication at 9-10. Indeed, as ASCENT explains, "Simply because a market has been opened to competitive entry does not mean that the prior monopoly provider has been stripped of market power, particularly when the prior monopoly provider continues to control virtually all connectivity to the entire universe of customers." ASCENT at 3-4. Put another way, it denies reality to "equate a BOC's meeting the Section 271 competitive checklist with the existence of meaningful competition in the BOC's territory." NASUCA at 3.

[5] SBC adopts an alternative approach, seeking to explain away the local market numbers by massaging its own data. Even then, SBC can do no better than to claim that CLECs serve "about 20% of local lines," that, at most, 70% of those lines (thus only 14% of the total) are served by CLEC switches, and, conveniently, that the Commission should consider only those few pockets where CLECs have been most successful, ignoring the remainder. SBC at 8-9.

[6] First Report & Order and Further Notice of Proposed Rulemaking, *In The Matter of Implementation of the Non-Accounting Safeguards of Sections 271 & 272 of the Communications Act of 1934, as amended*, 11 FCC Rcd. 21,905, ¶¶ 9-10 (1996).

Because they cannot refute these conclusions, the BOCs attempt to change the subject. Most importantly, they mischaracterize the purpose and scope of the MFJ's equal access and nondiscrimination requirements. Thus, they argue that the MFJ and the decisions applying the MFJ were directed at AT&T's dominance in the IXC market rather than on the BOCs' dominance of the local market. Having constructed this straw man, the BOCs then argue that the absence of a dominant carrier in the IXC market renders these requirements anachronisms. *See* BellSouth at 4; SBC at 3, 4, 11 & n.26; Verizon at 2-3, 6-7. Indeed, the BOCs suggest that the requirements had outlived their usefulness well before Congress in 1996 specifically preserved them through § 251(g).[7]

Contrary to the BOCs' claims, the equal access and nondiscrimination obligations reflected in the MFJ and decisions under it were not limited to concerns of discrimination in favor of the then-dominant interexchange carrier (AT&T). As AT&T has shown, the MFJ court as early as 1983 made clear that the MFJ required impartiality by BOCs in presubscription, AT&T at 11; as early as 1984 applied the MFJ to bar discrimination *against* AT&T, *id*. at 12; and, in 1985, made clear that the equal access and nondiscrimination rules of the MFJ barred a BOC from endorsing or favoring *any* IXC, *id*. at 11. The D.C. Circuit soon thereafter affirmed this broad view of the MFJ. *Id*. at 12-13. These decisions leave no doubt that the equal access and nondiscrimination requirements were designed not simply to protect AT&T's competitors from AT&T, but, more importantly, to protect all IXCs from the BOCs' abuse of their monopoly market power. *See id*. at 11-13.

---

[7] *See* BellSouth at 1 ("[I]t appears that most of the equal access and nondiscriminatory obligations were time sensitive and have been satisfied for many years"); Verizon at 3 (purpose of rules "was fulfilled long ago"); *id.* at 14-15 (arguing that rule requiring BOCs to read random list of IXC providers was obsolete by 1985).

The comments confirm this understanding of the purpose and scope of the MFJ's requirements carried forward through Section 251(g). *See* Gen. Communication at 8-9 ("[T]he purpose of the equal access obligations was not to protect competitive IXCs (or even LECs) from AT&T because it was the dominant IXC"); ASCENT at 9 (requirements broadly "reflect[ed] a concern that entities that controlled 'bottleneck' facilities would utilize that control to favor one carrier to the detriment of competitive providers"); *id*. at 10 n.22 ("[T]he pertinent consideration is not the presence or absence of a dominant interexchange carrier, but the continued dominance of incumbent LECs in the local exchange market"); NASUCA at 4 ("[T]he Commission is mistaken in its belief that the obligations contained in Section 251(g) were based only on a desire to reign in a dominant interexchange carrier"). Contrary to the BOCs' arguments, it is irrelevant that the IXC market no longer has a dominant carrier.

Indeed, the notion that Congress enacted Section 251(g) to carry forward obligations for the purpose of protecting BOCs from dominant interexchange carriers is fanciful. Specifically, the Commission declared AT&T to be non-dominant *before* Congress passed the 1996 Act. *See* NASUCA at 4. It thus would have made no sense for Congress to have carried forward the equal access and nondiscrimination obligations set forth in the MFJ if, as the BOCs argue, they were designed solely to address concerns regarding dominant interexchange carriers. If anything, the fragmentation of the IXC market over the last twenty years *increases* the ability of BOCs to manipulate that market, because "there is no longer a dominant independent IXC from which a large proportion of customers demand service." Gen. Communication at 10.

Several of the BOCs' additional arguments for repealing the equal access and nondiscrimination requirements continued by § 251(g) fail because they too mischaracterize the purposes underlying those requirements. For example, their arguments for "regulatory parity" are groundless. *See* BellSouth at 4; SBC at 6, 9; Verizon at 2, 11. These arguments assume—wrongly—that all LECs are similarly situated. As shown above, the BOCs' dominance of the local exchange bottleneck—the legacy of their government-sponsored monopolies—distinguishes them from other carriers and thereby refutes any argument that the regulations that apply to the BOCs should not differ from the obligations that apply to competitive LECs. Indeed, Congress itself codified the notion of differing regulatory obligations into the 1996 Act in general, *see*, *e.g.*, 47 U.S.C. § 251(c), and, in particular, Congress applied the obligations carried forward in Section 251(g) only to the BOCs and other ILECs, *i.e.*, those LECs who were under equal access and nondiscrimination requirements before February 8, 1996. *See* 47 U.S.C. § 251(g). The BOCs and other ILECs are not similarly situated to the CLECs because, unlike the CLECs, the BOCs wield substantial market power over local exchange facilities.

Second, the BOCs misstate the consequences of § 271 approval when they suggest that such approval eliminates the need for § 251(g)'s restrictions. *See* BellSouth at 4; SBC at 9, 13; Verizon at 2. As set forth above, the comments overwhelmingly confirm that § 271 approval increases the BOCs' incentives to discriminate, *supra* Part I.A, at 7-8, and does so without any counterbalancing showing that the BOCs lack the ability to discriminate by means of their local market dominance, *id*. at 5-7. Thus, § 251(g)'s requirements are, if anything, more necessary after § 271 approval.

Third, the BOCs' argument that the Commission should abolish restrictions on joint marketing, particularly restrictions on BOCs' discriminatory exploitation of inbound calls from customers, also should be rejected because it ignores the BOCs' local market dominance and resulting dominance over this unique and powerful means of marketing. *See* SBC at 2, 10-11; Verizon at 11-12. Verizon and its expert argue that the regulation of inbound calls is a matter of merely providing information to customers—information that, they claim, customers no longer need. *Id.* at 11, 16-17. Verizon makes the related claim—without citation—that the inbound channel is irrelevant because inbound customers know what carrier they want. *Id.* at 17. These arguments are beside the point. As Verizon well knows, and as the comments explain, inbound calls provide it a prime and unique opportunity to market long distance services to its local customers, one that has provided Verizon unprecedented market growth. *See* WorldCom at 3-4; AT&T at 23-25. The issue is not information, but rather discriminatory advertising through a marketing channel that is available only to the BOCs as a result of their prior monopoly positions over local markets and their continued market power over those same markets. WorldCom at 4-5. The equal access and nondiscrimination requirements rightly constrain BOCs' use of that exclusive advertising opportunity, because it is a byproduct of the BOCs' continuing market power over local facilities.

Verizon's related argument that § 251(g) does not even apply to BOC marketing practices—because the MFJ's equal access and nondiscrimination requirements allegedly did not do so—is contrary to settled law. *See* Verizon at 7, 10. Verizon can make that claim only by failing to cite a single decision under the MFJ. *See id*. The MFJ court repeatedly established that the MFJ's equal access and nondiscrimination requirements barred a BOC—in its marketing or otherwise—from favoring one IXC over another. In so doing, the MFJ court was carrying out the intent of the drafters of the MFJ, who expected these requirements to be "'construed broadly to encompass all potential areas of favoritism, subtle as well as overt.'" *United States* v. *AT&T Co.*, 552 F. Supp. 131, 142-43 (D. D.C. 1982) (*quoting* DOJ Competitive Impact Statement at

26-27).[8] The Commission has likewise repeatedly applied § 251(g) to BOC marketing. *See* AT&T at 24-27. It has explained that, with regard to inbound marketing, "[t]he obligation to provide such nondiscriminatory treatment stems from section 251(g) of the Act," *Non-Accounting Safeguards Order* ¶ 292, and that, because of the requirements imposed by the MFJ, "to the extent that BOCs align with non-affiliates, they must continue to do so on a nondiscriminatory basis," *id*. ¶ 293. Even SBC admits that "the MFJ court applied the MFJ so as to prohibit discrimination in favor of *any* carrier or provider," including by providing an endorsement. SBC at 4. Indeed, SBC also candidly acknowledges the Commission's prior determination that the MFJ court "'appeared to articulate broadly a principle of non-favoritism underlying the BOCs' equal access and nondiscrimination obligations.'"[9] SBC at 5 (*quoting AT&T Corp.* v. *Ameritech Corp.*, 13 FCC Rcd. 21438, ¶ 55 (1998)); *see also* BellSouth at 4.

[8] AT&T has highlighted these decisions previously, *see* AT&T at 10-13, and will not reiterate that discussion. Further, Verizon's invocation of the MFJ's "two unique serving arrangements" for the New York/New Jersey and New Jersey/Philadelphia corridors does not aid its argument. *United States* v. *Western Elec. Co.*, 569 F. Supp. 1057, 1107 (D. D.C. 1983). The court, in modifying the MFJ's ban on BOC interexchange service to permit this limited service, *see id*., 569 F. Supp. 990, 1019 (D. D.C. 1983), made no mention of also allowing exceptions to other requirements. Although BOCs were free to engage in outbound advertising of the interLATA service that the court permitted them to provide in these limited corridors, *see* 569 F. Supp. at 1110 n. 230, much as they may now conduct such advertising with their § 271 affiliates, there is no indication in the MFJ decisions, including the *Equal Access Case*, that the BOCs, in providing this special service, were generally exempt from nondiscrimination requirements. *See* AT&T at 9-13.

[9] SBC's argument that § 251(g) does not preserve the MFJ's provisions barring BOC discrimination in the procurement of products and services but preserves other non-discrimination and equal access obligations is erroneous. SBC at 4 n.5. Such picking and choosing from among the MFJ court's nondiscrimination and equal access requirements for BOCs—*see* 552. F. Supp. at 227—is not mandated by the statutory text and was clearly not the intent of Congress. *See* Conf. Rep. 104-458, 104th Cong., 2d Sess., 113, 123 (1996) (*reprinted* in 1996 U.S.C.C.A.N. 124, 134) (explaining that, under § 251(g), BOCs "shall have a statutory duty to provide equal access and nondiscrimination to interexchange carriers and information services providers"). The MFJ court, like Congress, viewed the nondiscrimination requirements of § II.B of the MFJ broadly and as a unit. *See* 552 F. Supp. at 142-43; *United States* v. *AT&T*

2. *The BOCs' Additional Arguments for Abolishing the Equal Access and Nondiscrimination Requirements Also Fail.*

The BOCs' additional arguments are equally unpersuasive. First, the BOCs contend that Section 251(g)'s requirements are unnecessary because they are redundant of other provisions in the 1996 Act. SBC at 6 (citing §§ 251(b)(3) & 272(c)); Verizon at 9-10 (citing §§ 251(a) & (b)(3)). That argument assumes, wrongly, that Congress enacted a statute without any substantive effect. If, as the BOCs contend, the equal access and nondiscrimination requirements of § 251(g) are materially redundant of other provisions in the 1996 Act, then Congress, in enacting Section 251(g), adopted a provision that was entirely superfluous. *See* ASCENT at 12 n.25. As AT&T has shown, although some provisions of § 251 other than subsection (g) may overlap with the MFJ's equal access and nondiscrimination obligations, the overlap is not complete, and it does not include some critical areas. AT&T at 21-22. Indeed, any overlap between § 251(g) and the nondiscrimination safeguards in § 272(c), *see* SBC at 6, is hardly a redundancy given that § 272(c) applies only to BOCs with § 271 approval.

Second, the BOCs, while arguing that § 251(g)'s protections are redundant and unnecessary in light of other sections of the 1996 Act, also offer the contradictory point that the Commission should simply use other statutory provisions, such as §§ 201 and 202, to fill the gaps that would otherwise be covered by Section 251(g). BellSouth at 5; SBC at 6; Verizon at 9-10, 11. AT&T previously demonstrated that §§ 201 and 202 were inadequate substitutes for the

---

Co., C.A. No. 82-0192, slip op. at 4 & n.4 (D. D.C. 1985) (holding that BOC's "endorsement of services" of an IXC "violated the non-discrimination provision of section II(B) of the decree"). Further, in context, *see* SBC at 11, it is evident that SBC is merely making an additional argument in favor of teaming, which involves a BOC procuring products or services from its preferred IXC. But it is undisputed that § 251(g) applies to teaming arrangements. *See supra* at 13-15. Indeed, SBC's argument is refuted by its admission that § 272(c), which bars discrimination in procurement by a BOC with § 271 authority, overlaps with the requirements carried forward by § 251(g). SBC at 6.

requirements carried forward by Section 251(g), AT&T at 22-23, and the comments confirm that conclusion, *see* ASCENT at 12 n.25, particularly given the BOCs' "continuing market power," WorldCom at 2. As even the BOCs acknowledge, the requirements carried forward in Section 251(g) were refined and developed through numerous decisions of the MFJ court and this Commission and now reflect a well-developed, coherent set of rules tailored to the special problems of BOCs' (and other ILECs') market power. *See* BellSouth at 1; SBC at 5. As such, they "provide a comprehensive set of safeguards that have been demonstrated to attenuate the ILECs' ability to use their market power to discriminate among long distance providers." WorldCom at 2.

Finally, as a textual matter, the mechanism for modifying the equal access and nondiscrimination requirements carried forward by § 251(g), is through express regulation. These obligations cannot be repealed or revised by "clarif[ication]," as SBC urges (at 2), or by issuing an order, as Verizon contends (at 9). AT&T has shown and the comments confirm what is evident from the unambiguous text of § 251(g): Any modification must be both explicit and "by regulations." 47 U.S.C. § 251(g). *See* AT&T at 16; ASCENT at 8 n.16; *see also* Sprint at 4. Quite clearly, Congress wanted to ensure that the Commission did not remove any of the MFJ's critical protections without full and fair consideration. *See* AT&T at 7.

In conducting any such examination, the Commission should, as the comments confirm, be guided by the standard of the MFJ court. *See id*. at 17; ASCENT at 11. The existing requirements should continue until there is no substantial possibility that a BOC has the incentive and ability to use local market power to impede interexchange competition. *Id.* (noting that under MFJ, BOC bore the burden of showing that it neither retained control of network facilities necessary for competitors to reach consumers, nor "possessed the incentive and ability to use such 'bottleneck' control to impede competition").

II. THE COMMENTS CONFIRM THE NEED FOR THE COMMISSION TO TAKE ADDITIONAL STEPS TO COMBAT THE BOCS' ABILITY TO USE THEIR MARKET POWER TO UNDERMINE LONG DISTANCE COMPETITION.

The comments also confirm that current marketplace and legal conditions require that the Commission take additional steps to combat discrimination by BOCs that undermines competition. *See* AT&T at 23-43. Indeed, the BOCs have not hesitated to abuse their market position, and therefore the existing requirements carried forward in Section 251(g) should be bolstered to protect and secure interexchange competition.[10] In particular, it is critical for the Commission to step into those areas where the BOCs are able to trade on their enduring market power over the local exchange and related services such as the inbound channel in order to manipulate other markets.

For example, the comments recognize that the requirements that govern the BOCs marketing efforts with regard to inbound calls for "new service" should also apply to inbound calls for second or additional lines, and that BOCs should not be permitted to use the inbound channel to favor their long distance affiliate over other interexchange carriers. ASCENT at 12; WorldCom at 3-5; *see also* AT&T at 23-29. Indeed, from the perspective of the carriers, it is irrational to continue to treat second or additional lines differently from first lines because the

[10] *See* ASCENT at 7-8 (recommending that Section 251(g) obligations "be preserved, and expanded"); *id.* at 13-16 (discussing areas where further regulation is necessary); Gen. Communication at 10 ("ILECs have more incentive to favor their own interexchange services and affiliated IXCs than ever"); Texas PUC at 5 ("the actions taken by some of the BOCs to provide long distance service through joint marketing arrangements may undermine the intent of Congress and thus bypass the 271 safeguards that benefit competition and customers"); WorldCom at 4 ("the Commission should update and clarify the equal access rules to recognize that RBOCs that have obtained interLATA authority have greater incentives to discriminate against other long distance providers").

"BOCs' market power, and incentive to discriminate in favor of their own long distance affiliate, is the same for all inbound calls from local customers." WorldCom at 5; *accord* ASCENT at 12. As a result, there is "no reasoned basis" for extending the protections of Section 251(g) only to customers seeking "first lines." WorldCom at 5. Although SBC argues that there should be no limits on inbound marketing, it too acknowledges that there is no rational basis for drawing distinctions between the first line and additional lines. SBC at 10.[11]

Not only do current market conditions mandate the above requirements, but current legal conditions do as well, in particular § 271 approval. As explained above, § 271 creates a new and powerful incentive for BOCs to discriminate. Concerns over the anticompetitive effect of the inbound channel once § 271 approval is obtained are far from speculative. *See* AT&T at 18-19 (Selwyn Decl.). Indeed, Verizon has, in less than two years of providing long distance service in New York pursuant to § 271, obtained a market share that MCI needed over a decade to reach and that Sprint has never even approximated. WorldCom at 3-4; *see also* AT&T at 24-25 (same).[12] Leveraging of local power is the only reasonable explanation. *Id.* Thus, the BOCs, in noting the high churn rate in long distance service, *e.g.*, Verizon at 16, merely highlight the importance of their control over the "inbound channel."

Additionally, as AT&T previously explained, the Commission also should (1) require that control over customers' preferred carrier choices, changes, and freezes reside not

---

[11] Similarly, any teaming by a BOC with a non-affiliated IXC is highly suspect, and should be permitted, if at all, only if it does not discriminate among IXCs. *See* ASCENT at 15; WorldCom at 5; Sprint at 5; AT&T at 26 n.19. Nor should BOCs be permitted to use other means of leveraging their local market dominance, such as billing inserts or discounts on local service in exchange for purchasing long distance services from their affiliate. ASCENT at 13.

[12] *See also* AT&T at 24-25 (noting ability of BOCs to leverage control over inbound channel to obtain significant gains in long distance market share); NASUCA at 6 ("in the first quarter of 2002 SBC added 451,000 long distance customers in the six states in which it is authorized to provide long distance service").

with the BOCs but with an independent party that would ensure that market power abuses were avoided, AT&T at 29-39, and (2) impose mandatory customer account record exchange ("CARE") obligations on all local exchange carriers, *id*. at 39-43. These additional rules are necessary to correct market problems arising from § 271 approvals and from a breakdown in the system by which IXCs obtain critical information about their customers. The comments make clear that additional protections are warranted. Indeed, as the *Notice* itself acknowledges, the Commission should adjust the requirements carried forward by § 251(g) to new conditions to ensure continued robust competition. These additional obligations are essential to promoting competition both in the local and interexchange markets.

III. THE COMMENTS CONFIRM THAT EQUAL ACCESS AND NONDISCRIMINATION REQUIREMENTS BENEFIT COMPETITION ONLY WHEN APPLIED TO LIMIT THE EXERCISE OF MARKET POWER OVER BOTTLENECK LOCAL FACILITIES.

The rationale for the equal access and nondiscrimination requirements imposed by the MFJ and carried forward by § 251(g) dictates the limit of their applicability. Not even the BOCs suggest that the equal access and nondiscrimination requirements should be extended to competitive LECs. Indeed, as the comments confirm, there is no reasonable basis to impose those requirements on a LEC that lacks market power over local exchanges, and therefore there is no persuasive reason for extending those requirements to CLECs. That is, "[b]ecause competitive LECs do not control 'bottleneck' facilities and lack both cognizable market share and certainly market power, there is no need to extend equal access and nondiscrimination requirements to them." ASCENT at 9 n.19, 10 n.22. For the same reason, so long as BOCs continue to dominate local exchanges and markets, the Commission should, at a minimum, maintain the equal access and nondiscrimination requirements of § 251(g), *see id.* at 13 n.28.

CONCLUSION

For the foregoing reasons, the Commission should (i) continue the equal access and nondiscrimination obligations carried forward through Section 251(g); (ii) enforce restrictions on joint marketing to minimize the BOCs' ability to leverage their bottleneck control over the LEC connect channel as a means of marketing services offered by their long distance affiliates, and extend those restrictions to all customer requests for additional lines, inquiries, and changes to their service; (iii) issue a proposed rulemaking to assess the propriety of prohibiting the BOCs from handling customers' preferred carrier choices, changes, freezes, and related issues; (iv) mandate that all LECs provide uniform, timely, and complete CARE data, and (v) refrain from extending the equal access and nondiscrimination requirements to nondominant carriers.

Respectfully submitted,

/s/ Mark C. Rosenblum

Mark C. Rosenblum
Lawrence J. Lafaro
Stephen C. Garavito
Martha Lewis Marcus
AT&T CORP.
Room 1135L2
295 North Maple Avenue
Basking Ridge, N.J. 07920
(908) 221-8100

David L. Lawson
Paul J. Zidlicky
C. Kevin Marshall
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000

Counsel for AT&T Corp.